

**EXHIBIT 3**

### **Exhibit 3**

**BEFORE THE  
GEORGIA PUBLIC SERVICE COMMISSION**

In Re	)	
	)	
Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc Against BellSouth Telecommunications, Inc	)	Docket No. 11901-U

**BELLSOUTH TELECOMMUNICATIONS, INC.'S  
MOTION TO REOPEN THE RECORD**

**I. INTRODUCTION**

BellSouth Telecommunications, Inc ("BellSouth") respectfully moves the Georgia Public Service Commission ("Commission") for leave to reopen the record by having the Commission consider newly discovered evidence in this case. This newly discovered evidence consists of discovery responses served in Florida by MCI WorldCom Communications, Inc and MCImetro Access Transmission Services, LLC (collectively "MCI") and selected documents from MCI's website, which reflect that MCI is currently offering Digital Subscriber Line ("DSL") service to its residential voice customers in Georgia. This newly discovered evidence contradicts the testimony of MCI's witnesses and undermines MCI's claims in this proceeding and should be considered by the Commission

**II. STATEMENT OF THE FACTS**

On June 2, 2003, MCI served responses to discovery in Docket No. 020507-TP, which is a proceeding pending before the Florida Public Service Commission concerning a complaint filed against BellSouth by the Florida Competitive Carriers Association. In these discovery responses, a copy of the public disclosure version of which is attached as Appendix 1, MCI acknowledged that it recently had "begun selling DSL to its UNE-P customers in Florida "

Appendix 1, at 6 MCI provided the rates, terms, and conditions for its DSL service and indicated that it also was providing DSL service in other states, including Georgia. *Id.* at 7,

After receiving these discovery responses, BellSouth attempted to confirm that MCI was offering DSL service to its UNE-P customers in Georgia. BellSouth did so by checking MCI's website for the "Neighborhood," which features a service called "Neighborhood Hispeed." This service, which is designed for customers wanting "unlimited local, long distance calling and high speed Internet access," uses DSL technology and is available for \$99.99 per month. By entering a working telephone number for a BellSouth customer in DeKalb County, BellSouth confirmed that MCI offers DSL service to residential customers in Georgia who are served via the UNE-P. Copies of selected pages from MCI's website are attached as Appendix 2.

### **III. DISCUSSION**

A court may reopen a case for the introduction of additional evidence at any time before a decision is rendered. *Strickland v. State*, 115 Ga. 227, 41 S.E. 713, 715 (1902). The decision whether to do so rests largely in the court's discretion. *Dimmick v. Pullen*, 120 Ga. App. 743, 172 S.E.2d 196, 197 (1969); *Dennis v. Weekes*, 46 Ga. 514 (1872) (a court "may . . . permit the introduction of evidence that should have been offered earlier but was inadvertently omitted or discovered subsequently"). However, the refusal to reopen a case can be an abuse of discretion when the party presenting the additional evidence has acted in good faith and no prejudice would result to the other party if the case were reopened. *Wickham v. Torley*, 136 Ga. 594, 71 S.E. 881, 883 (1911). In reopening a case, the court may do so to receive certain evidence on a particular point without reopening it for the introduction of evidence generally. *Bridger v. Exchange Bank*, 126 Ga. 821(2), 56 S.E. 97, 99 (1926).

Here, the Commission should reopen the record to consider the newly discovered documents that are the subject of this Motion. BellSouth has acted in good faith in obtaining the documents attached as Appendix 1 and Appendix 2, and BellSouth's failure to introduce these documents at the hearing is not attributable to any lack of diligence on BellSouth's part. On the contrary, these documents did not exist at the time the hearings were held on February 11 and 12, 2003 because it was only after those hearings that MCI began offering DSL service to its UNE-P customers in Georgia. *Cf. Parrott v. Fairmont Development, Inc.*, 256 Ga. App., 568 S.E.2d 148, 150 (2002) (upholding trial court's refusal to reopen the case when the plaintiff, who was in possession of the document in question prior to trial, "simply waited until trial to thoroughly examine the document . . .")

Reopening the record to consider the documents that are the subject of BellSouth's Motion would not prejudice MCI. On the contrary, MCI should welcome the introduction of these documents into evidence in order to set the record straight. For example, at the hearing, MCI's witness Lichtenberg told this Commission that MCI was not able to offer its own competing DSL service because it lacked "the enormous capital expenditure that would be required to enter the Georgia DSL market . . ." Lichtenberg, Tr. at 27. Similarly, MCI witness Gillan testified that MCI could not "as a practical matter" offer its own competing package of voice and DSL service and that, as result, "MCI will be forced to cede that market segment to BellSouth" unless BellSouth were required to provide its DSL service to MCI's voice customers. Gillan, Tr. at 138. Obviously, both Ms. Lichtenberg and Mr. Gillan were mistaken, as MCI is capable of offering its own competing DSL service and can readily compete for customers seeking a package of voice and DSL service, since it is doing so in Georgia today.

Furthermore, Ms. Lichtenberg told this Commission that a customer using BellSouth's DSL service would be unlikely to switch voice providers because "the customer would need to change his or her e-mail address and notify his or her contacts of that change." Lichtenberg, Tr. at 25. However, MCI's DSL service allows a customer using America Online to retain his or her AOL e-mail address. Appendix 2 at 5. Thus, a BellSouth DSL customer using AOL who switches to MCI's DSL service would not have to change his or her e-mail address, notwithstanding Ms. Lichtenberg's testimony to the contrary.<sup>1</sup>

Failure to reopen the record would result in a manifest injustice, since the newly discovered evidence that is the subject of BellSouth's Motion completely undermines MCI's claims against BellSouth. The lynchpin of those claims is MCI's position that BellSouth's policy to provide DSL service "if and only if the end user customer purchases BellSouth's retail voice service (either as provided by BellSouth or resold by a CLEC)" is anticompetitive and discriminatory in violation of Georgia law. MCI Post-Hearing Brief at 17. As Mr. Gillan opined, "If BellSouth is permitted to refuse DSL service to customers merely because they desire a different voice provider, then customers clearly will be harmed." Gillan, Tr. at 129-130.

While BellSouth obviously disagrees with such claims, the Commission should be aware that MCI provides DSL service if and only if the end user customer purchases MCI's voice service and refuses DSL service to customers merely because they desire a different voice provider. This is clear from the terms and conditions section of its "Neighborhood HiSpeed"

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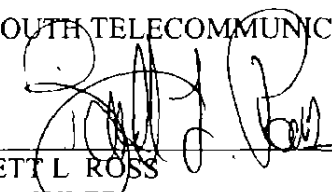
<sup>1</sup> It is unclear whether MCI's representatives were or should have been aware of MCI's plans to offer DSL service to residential customers in Georgia when they testified before this Commission at the hearings on February 11 and 12, 2003. However, it appears that within two months of those hearings, MCI's Chief Executive Officer announced the company's intention to offer residential DSL service, which presumably had been in the works for some time. See Blumenstein, R. and Zuckerman, G., "A Resurrection of WorldCom Worries Ailing Telecom Sector," *The Wall Street Journal* (April 15, 2003) (describing the Neighborhood plan and stating that "Mr. Capellas says that WorldCom also plans high-speed Internet service via digital subscriber lines by using assets it purchased last year (from another company in bankruptcy)").

service, in which MCI warns customers *"If you change your local telephone company, your DSL service will be cancelled, and you will be assessed the equipment charge of \$150.00."* Appendix 2, at 8-9 (emphasis added), Appendix 1, at 8 Or, as MCI states more bluntly: *"Your local phone company must be MCI for you to receive DSL Service."* Appendix 2, at 10 (emphasis added) In short, to receive MCI's DSL service, a customer must purchase voice service from MCI, and should the customer prefer a different local voice provider, the customer cannot get DSL service from MCI It is hypocritical for MCI to challenge conduct in which MCI itself is engaged, and the Commission must consider such hypocrisy in resolving this case.<sup>2</sup>

For the foregoing reasons, the Commission should grant BellSouth's Motion and should reopen the record by including Appendix 1 and Appendix 2 to this Motion as part of the record in this case

Respectfully submitted, this 23rd day of June, 2003.

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<sup>2</sup> According to Mr. Gillan, the "fundamental issue" in this case "is whether it is reasonable for BellSouth to refuse to provide service to its own customers . . ." Gillan, Tr. at 155 If anything, BellSouth's DSL policy is more reasonable than MCI's, since a BellSouth DSL customer can retain the DSL service while having her or her voice service provided by a CLEC engaged in resale The same cannot be said about MCI, which will disconnect DSL service if the customer decides to choose any voice provider other than MCI

**CERTIFICATE OF SERVICE**

**Docket No. 11901-U**

This is to certify that I have this day served a copy of the within and foregoing upon known parties of record, upon known parties of record, by sending same via United States Mail, properly addressed as follows

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This 23<sup>rd</sup> day of June 2003

